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Catholic University Law Review

Volume 36
Issue 1 *Fall 1986*

Article 8

1986

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Recommended Citation

Christy Concannon, *The EAJA and the NLRB: Chilling the General Counsel's Prerogative to Issue Unfair Labor Practice Complaints?*, 36 Cath. U. L. Rev. 175 (1987).
Available at: https://scholarship.law.edu/lawreview/vol36/iss1/8

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COMMENTS

THE EAJA AND THE NLRB: CHILLING THE GENERAL COUNSEL'S PREROGATIVE TO ISSUE UNFAIR LABOR PRACTICE COMPLAINTS?

In 1980, Congress passed the Equal Access to Justice Act (EAJA)[1] that provides for the award of attorney's fees to a party prevailing in litigation in an action brought by the federal government.[2] Unless the government can prove that its position was "substantially justified" or that "special circumstances" would render the award unjust, the prevailing party is awarded the fees.[3] The EAJA was enacted in order to ensure that certain parties, particularly individuals and small businesses, are not coerced into complying with government action simply because of the litigation expenses involved.[4] Congress contemplated that the award of attorney's fees would encourage individuals to challenge potentially unreasonable or arbitrary government action and deter similar government behavior in the future.[5]

The EAJA is of particular concern to the National Labor Relations Board (NLRB), which has been a party to more than half of the administrative proceedings involving the EAJA.[6] In an NLRB proceeding under the EAJA, a party must first prevail on the merits of an unfair labor practice

1. Pub. L. No. 96-481, §§ 201-208, 94 Stat. 2325, 2325-30 (1980) (codified at 5 U.S.C. § 504 (1982) and 28 U.S.C. § 2412(d)(1)(A) (1982), *as amended by* Act of Aug. 5, 1985, Pub. L. No. 99-80, 54 U.S.L.W. 1 (U.S. Sept. 10, 1985)) [hereinafter EAJA]. EAJA authorizes attorney's fees and awards in both judicial proceedings, 28 U.S.C. § 2412(d)(1)(A) (1982), and in administrative actions, 5 U.S.C. § 504 (1982). The EAJA was enacted with a three year "sunset" clause which repealed 28 U.S.C. § 2412(d) as of Oct. 1, 1984. Pub. L. No. 96-481, § 204(c), 94 Stat. 2325, 2329 (1980). Notwithstanding a veto by President Reagan, the Act was reenacted into permanent law in 1984. *See Equal Access Reauthorization Pocket Vetoed By President,* 42 CONG. Q. WEEKLY REP. 2964 (1984) (reprinting the President's memorandum of disapproval).

2. The term attorney's fees also includes litigation expenses such as witness fees, expert witness fees and other expenses incurred in litigation. 28 U.S.C. § 2412(d)(2)(A) (1982).

3. 5 U.S.C. § 504(a)(1) (1982); 28 U.S.C. § 2412(d)(1)(A) (1982).

4. Pub. L. No. 96-481, § 202(a), 94 Stat. 2325 (1980). *See* H.R. REP. No. 1418, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4988.

5. Pub. L. No. 96-481, § 202(a), 94 Stat. 2325 (1980).

6. *NLRB General Counsel on Equal Access to Justice Act—The First Year, Memorandum GC 83-11, reprinted in* 1983 LABOR RELATIONS YEARBOOK (BNA) 222-26 [hereinafter *Mem-*

case and, within thirty days of the final order, submit a fee application to the Board.[7] The General Counsel must then demonstrate to the Board or an administrative law judge that her position was substantially justified in order to avoid the award of attorney's fees.[8]

This Comment will examine the traditional role of the General Counsel of the NLRB to issue unfair labor practice complaints with unreviewable discretion and the history of the EAJA. It will explore the meanings of the terms "position of government" and substantially justified under the EAJA. In examining the "position of the agency" requirement, this Comment will propose that the initial issuance of an unfair labor practice complaint may be beyond the scope of EAJA proceedings. Nevertheless, the EAJA requirement of substantially justified will be compared to the NLRB standards for issuing a complaint. Further, this Comment will suggest that the EAJA has the potential for "chilling" the traditional independence of the General Counsel in issuing complaints. While recent case law involving EAJA claims before the NLRB will demonstrate that these fears are unfounded to date, the new 1985 amendments to the EAJA could realize the chilling of the issuance of unfair labor practice complaints.

I. THE GENERAL COUNSEL'S PREROGATIVE TO ISSUE UNFAIR LABOR PRACTICE COMPLAINTS

A. The History of the General Counsel's Independence from the Board

In 1947, the Labor Management Relations Act (LMRA) was passed, offering significant changes and additions to the 1935 National Labor Relations Act (NLRA).[9] One of the most debated revisions of the NLRA was the creation of an independent General Counsel, endowed with the power to investigate, review and issue unfair labor practice complaints. Prior to the Act's revision, the NLRB possessed the investigatory power in addition to its power to adjudicate cases. Critics of the NLRA maintained that the original system caused the Board to solicit litigation for the purposes of harass-

orandum GC 83-11]. *See also* Lieberwitz, *Attorneys' Fees, The NLRB, and The Equal Access to Justice Act: From Bad to Worse*, 2 HOFSTRA LAB. L.J. 1, 2 (1984).

7. The application must allege that the applicant and its subsidiaries had an aggregate net worth of no more than seven million dollars and no more than 500 employees at the time the complaint was issued. The complaint must also allege that the General Counsel's position was not substantially justified. 5 U.S.C. § 504(b)(1)(B) (1982) (as amended by Act of Aug. 5, 1985, Pub. L. No. 99-80, 54 U.S.L.W. 1 (U.S., Sept. 10, 1985)). *See* Peterson, *The NLRB and Equal Access to Justice: A Promise Unfulfilled?*, 34 LAB. L.J. 266, 267 (1983).

8. Peterson, *supra* note 7, at 267.

9. The Labor-Management Relations Act of 1947 (LMRA), ch. 120, 61 Stat. 136, amended the National Labor Relations Act of 1935 (NLRA), Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1982)).

ing management or establishing a point of law.[10] The LMRA changed this practice by creating the General Counsel, a "new official to exercise various prosecuting and investigative functions under the National Labor Relations Act, to be entirely independent of the Board."[11] The 1947 amendments established that the General Counsel would have "the final authority to act in the name of, but independently of, any direction, control, or review by the Board in respect of the investigation of the charges and issuance of complaints of unfair labor practices."[12] Consequently, the General Counsel was given the independence to issue complaints unaffected by the Board's opinions or political dispositions.[13] The LMRA further enhanced this independence by stating that the General Counsel was to be appointed by the President, rather than chosen by the Board.[14]

Although the General Counsel's independence was subject to much de-

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10. H.R. REP. NO. 3109, 76th Cong., 3d Sess., pt. 1, at 44-48 (1940). *See also* C. MORRIS, THE DEVELOPING LABOR LAW 33 (2d ed. 1983).

11. H.R. REP. NO. 245, 76th Cong., 3d Sess. 5 (1940), *reprinted in* I NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 296 (1985) [hereinafter I LEGISLATIVE HISTORY].

> Mr. Owens. I believe that one of the most important portions of this bill is the division of powers; that is, the division of the functions, the investigation, the prosecution, the complaints, and the judicial end. The gentleman mentioned that the general counsel would be absolutely independent . . . . It is my understanding that the conference is saying to the House at this time that . . . [in different] sections, where they mention the Board, [they mean] that it is the general counsel who shall have the power to proceed with the investigation, with the complaint, and shall have complete power over the attorney's who are prosecuting; that the Board shall not control [her] or have the right of review in any way. Is that correct?
>
> Mr. Hartley. The gentleman's opinion is absolutely correct . . . [the General Counsel] acts on behalf of the Board but completely independent of the Board.

Id. at 883.

12. Prior to 1947, the regional directors were required to obtain the consent of the Board before issuing a complaint. Clearly, this practice gave the Board enormous influence over the cases which they wished to hear. *See* H. MILLIS & E. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 38-39 (1950). With the creation of the General Counsel, the regional directors became part of the General Counsel, and thus, independent of the Board.

13. Critics of the LMRA asserted that the Board's issuance of a complaint in several cases indicated bias. For example, in Berkshire Knitting Mills, 17 N.L.R.B. 239 (1939), the Board had ordered an investigation of violations before charges were filed by the union. *See* H.R. REP. NO. 3109, 76th Cong., 3d Sess., pt. 1, at 47-49 (1940).

14. Opponents of the 1947 bill argued that the system could result in

> [a] labor Czar . . . [a] single individual [who] will exercise not only complete power over all the Board's legal work . . . but over most of its administrative work as well. One person will determine when complaints shall issue in all cases, how investigation shall be conducted, how cases shall be tried, which cases shall be enforced. Much of this action will not be subject to appeal, either to the Board or the courts. Any discipline of this individual is precluded by making [her] a Presidential appointee, subject to Senate confirmation, removable only for clear malfeasance in office.

93 CONG. REC. 6671 (1947), *reprinted in* II NLRB LEGISLATIVE HISTORY OF THE LABOR-

bate during the passage of the LMRA and in subsequent years,[15] the General Counsel's unreviewable discretion to issue a complaint independently of the Board has since been clearly established. In *Vaca v. Sipes,*[16] the United States Supreme Court held that "the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint."[17] The Court's statement in the *Vaca* decision indicates that the General Counsel's independence in issuing unfair labor practice complaints extends to the courts as well as to the Board.[18] Thus, traditionally the General Counsel

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MANAGEMENT RELATIONS ACT, 1947, at 1567 (1985) (remarks of Sen. Murray, June 6, 1947) [hereinafter II LEGISLATIVE HISTORY].

15. When President Truman vetoed the LMRA, he noted that the General Counsel was given broad discretion to issue complaints and that this power was *too* broad. Truman worried that the General Counsel's power would result in policymaking by deciding which cases the Board would hear. *See* Veto Message of President Truman (June 20, 1947), *reprinted in* 93 CONG. REC. 7485, 7486 (1947). Soon after the LMRA was passed, Congress reconsidered the independent status of the General Counsel. *See, e.g.,* S. 249, §§ 101-103, 81st Cong., 1st Sess. (1949), *reprinted in* S. REP. NO. 99, 81st Cong., 1st Sess. pt. 1, at 73-79 (1949) (proposal to end the General Counsel's independent status); Reorganization Plan No. 12 of 1950, *reprinted in* S. REP. NO. 1516, 81st Cong., 2d Sess. 16 (1950) (plan to abolish the Office of General Counsel and transfer its functions to the Board). For a fuller discussion of these plans, see Rosenblum, *A New Look at the General Counsel's Unreviewable Discretion Not to Issue a Complaint Under the NLRA,* 86 YALE L.J. 1349, 1357-58 (1977).

Most recently the National Right to Work Legal Defense Foundation denounced NLRB General Counsel Rosemary Collyer for her "decision to dismiss unfair labor practice charges" challenging an agreement between General Motors and the United Auto Workers. As a result, "the Right To Work group unveil[ed] draft legislation to end the unreviewable discretion of the Board's General Counsel to dismiss unfair labor practice charges. Under the legislation, the [General Counsel's] decisions not to issue complaints would be appealable to the Board, whose rulings could be taken to the federal appeals court like any other NLRB orders." Daily Lab. Rep. (BNA) No. 108, at 1-2 (June 5, 1986).

16. 386 U.S. 171, 182 (1967). *See also* United Elec. Contractors Ass'n v. Ordman, 366 F.2d 776 (2d Cir. 1966) (per curiam), *cert. denied,* 385 U.S. 1026 (1967).

17. 386 U.S. at 182.

18. *See* Bays v. Miller, 524 F.2d 631 (9th Cir. 1975); Hernandez v. NLRB, 505 F.2d 119 (5th Cir. 1974) (per curiam); Braden v. Herman, 468 F.2d 592 (8th Cir. 1972) (per curiam), *cert. denied,* 411 U.S. 916 (1973); Saez v. Goslee, 463 F.2d 214 (1st Cir.) (per curiam), *cert. denied,* 409 U.S. 1024 (1972); Mayer v. Ordman, 391 F.2d 889 (6th Cir.) (per curiam), *cert. denied,* 393 U.S. 925 (1968); Contractors Ass'n v. NLRB, 295 F.2d 526 (3d Cir. 1961); Bandlow v. Rothman, 278 F.2d 866 (D.C. Cir.) (per curiam), *cert. denied,* 364 U.S. 909 (1960); General Drivers Local 886 v. NLRB, 179 F.2d 492 (10th Cir. 1950); Lincourt v. NLRB, 170 F.2d 306 (1st Cir. 1948) (per curiam). Thus, a decision of the General Counsel not to issue an unfair labor practice complaint is not subject to review under § 10(f). *Cf.* Southern Cal. Dist. Council of Laborers Local 1184 v. Ordman, 318 F. Supp. 633 (C.D. Cal. 1970) (reversing the General Counsel's refusal to investigate a complaint based on an erroneous interpretation of the statute).

In addition, such decisions are not subject to judicial review under § 701 of the Administrative Procedure Act. *See* 5 U.S.C. § 701(a) (1982); *see also* George Banta Co. v. NLRB, 626 F.2d 354 (4th Cir. 1980), *cert. denied,* 449 U.S. 1080 (1981); Seafarer's v. NLRB, 88 L.R.R.M. 26, 29 (D.C. Cir. 1975) (per curiam); Kolinske v. Automobile Workers, 530 F. Supp. 728 (D.C. 1982). It is well established that both the Board and the courts are free to dismiss a

could decline to issue a complaint without fear of judicial review.

Because a decision made by the General Counsel is unreviewable, a charging party has no other judicial or administrative avenues for relief.[19] Therefore, the duty of the General Counsel to issue unfair labor practice complaints is vital to the public enforcement of the NLRA. For this reason, the independent nature of the General Counsel's decisions has been viewed as a desirable and important aspect of the NLRB.[20] The enactment of the EAJA threatens to interfere with the General Counsel's established independence, as it requires both the Board and the courts to determine whether the General Counsel was substantially justified in the issuance of an unfair labor practice complaint.[21] The EAJA requirement of substantial justification conflicts with the General Counsel's traditional requirement of reasonable cause to issue an unfair labor practice complaint.[22]

B. The Standard and Procedure Required for the General Counsel to Issue an Unfair Labor Practice Complaint

The General Counsel's decision of whether to issue a complaint is essentially based upon a reasonableness determination. The NLRA, the LMRA, and the legislative history of the LMRA all provide guidelines for the General Counsel to follow in issuing a complaint.[23] The reasonable cause standard, identified in the legislative history of the LMRA,[24] instructs the General Counsel to issue a complaint if there is reasonable cause to believe that an unfair labor practice charge is true.[25] Additionally, the legislative

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complaint once it has been issued. *See also* Morris, *supra* note 10. *See generally* Note, Heckler v. Chaney: *The New Presumption of Nonreviewability of Agency Enforcement Decisions,* 35 CATH. U.L. REV. 1099 (1986).

19. Several commentators assert that the General Counsel's unreviewable discretion allows excessive power to vest in one individual. *See* Rosenblum, *supra* note 15; McClintock, *The Unreviewable Power of the General Counsel—Partial Enforcement of The Labor Act,* 12 GONZ. L. REV. 79 (1976); Gabriel, *The Role of the NLRB General Counsel,* 26 LAB. L.J. 79 (1975). *See also* 93 CONG. REC. 6655, 6671 (1947), *reprinted in* II LEGISLATIVE HISTORY, *supra* note 14, at 1567, 1588 (remarks of Sen. Murray and Sen. Pepper criticizing the role of the General Counsel).

20. *See supra* notes 11-13 and accompanying text.

21. The EAJA amendments appear to suggest that the issuance of a complaint is in fact a "position of government" that may be subject to attack. H.R. REP. NO. 120, 99th Cong., 1st Sess., pt. 1, at 11-12, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 140-41. *But see infra* note 52 and accompanying text.

22. *See infra* notes 23-31.

23. *See infra* notes 24-31. The NLRA forbids the issuance of a complaint based upon an unfair labor practice that has occurred more than six months prior to the filing of charges with the Board. 29 U.S.C. § 160(b) (1982).

24. H.R. REP. NO. 245, 76th Cong. 3d Sess. 35 (1940), *reprinted in* I LEGISLATIVE HISTORY, *supra* note 11, at 331.

25. *Id.*

history indicates that the General Counsel is required to issue a complaint when the matter is "borderline." Therefore, the General Counsel may exercise "discretion" not to issue a complaint only when the facts alleged by the complainant do not constitute an unfair labor practice, or when the complainant clearly cannot prove his claim.[26] When in doubt, the General Counsel should issue a complaint.

The Office of the General Counsel has also promulgated guidelines to determine the merits of unfair labor practice charges in its Case Handling Manual.[27] After a charge is filed at the regional level, the Regional Office investigates the charge to "ascertain, analyze, and apply the relevant facts in order to arrive at the proper disposition of the case."[28] The Regional Office must consider "relevant facts," "[l]egal analysis of available factual materials," and "[r]esolutions of conflicts"[29] in determining whether the charge has merit. Most importantly, the Case Handling Manual also provides that "[i]n the infrequent case in which (1) applying all relevant principles, the Region is unable to resolve credibility, and (2) the resolution of one conflict *means the difference between dismissal and issuance of complaint,* a complaint should be issued."[30] However, the resolution of credibility issues by the Region is, in practice, the exception rather than the rule.[31] Whenever doubt exists, the Regional Office, utilizing its discretion, usually will issue a complaint.

The reasonable cause standard is appropriate in the context of NLRB proceedings where, if a complaint is not issued, the charging party will have no other avenue of relief. Therefore, it is better to issue a complaint, which may or may not be dismissed, rather than refuse to issue a complaint that may only possibly possess merit. The issuance of a complaint does not determine whether an unfair labor practice in fact has occurred. Rather, it simply indicates that an unfair labor practice is alleged to have occurred. The complaint is simply a starting point from which an administrative law judge may resolve credibility and legal issues and then determine if the alleged violation of the NLRA has indeed occurred.

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26. *Id.*

27. NLRB Case Handling Man. (CCH) ¶¶ 100-160 (1983).

28. *Id.* at 501.

29. *Id.* The Regional Office is expected to resolve factual conflicts by reinterviewing parties and having other Board agents reinterview the parties. *Id.* at 600.

30. *Id.* (emphasis in original).

31. *See* Peterson, *supra* note 7, at 273 (citing *Midwestern Builders, Inc.*, No. 8-CA-14351-(E) (May 26, 1982). In *Midwestern Builders,* the administrative law judge stated that "[i]t is not the function of the General Counsel to resolve such [credibility] issues in the absence of a hearing." *But cf.* Rosenblum, *supra* note 15, at 1361 (regional offices sometimes ignore evidence and refuse to issue a complaint).

The standards provided in the legislative history and Case Handling Manual come into direct conflict with the standard required by the EAJA. The EAJA requires that the General Counsel be substantially justified in the decision to issue an unfair labor practice complaint.[32] If conflicts of credibility and doubtful legal issues exist, the issuance of a complaint is reasonable for the explanations stated above, although it may not be substantially justified. Conflicts may potentially arise as the Office of the General Counsel follows traditional standards for issuing a complaint while EAJA claims require reviewing the action under a higher standard. Thus, the standards imposed by the EAJA threaten the traditional independent role of the General Counsel with the increased possibility of large lawsuits against the NLRB.

II. EQUAL ACCESS TO JUSTICE ACT

Traditionally, the United States Government has been protected against suits by private citizens by the doctrine of sovereign immunity,[33] and the American Rule, which prohibits fee shifting.[34] The EAJA reduced these protections significantly by codifying common law exceptions and making the federal government liable for attorney's fees in certain administrative proceedings and civil actions.[35] The EAJA provides that courts may award attorney's fees and expenses "to the prevailing party in any civil action brought by or against the United States."[36] Unless the agency can prove that its position was substantially justified, or that "special circumstances make an award unjust,"[37] the statute requires that attorney's fees be awarded to the prevailing party.

The purpose of the EAJA is to ensure that certain individuals, partnerships, corporations, business associations, or other organizations will not be deterred from seeking review of, or defending against, unreasonable government action due to the litigation expense involved.[38] Accordingly, the

32. 5 U.S.C. § 504(c)(1) (Supp. III 1985).

33. For a more complete discussion of the doctrine of sovereign immunity, see Note, *Will the Sun Rise Again for the Equal Access to Justice Act?,* 48 BROOKLYN L. REV. 265 (1982).

34. The American Rule prohibits the award of attorney's fees to the winning litigant in federal litigation in the absence of statutory authorization. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-71 (1975). *See generally* Derfner, *The True "American Rule": Drafting Fee Legislation in the Public Interest,* 2 W. NEW ENG. L. REV. 251 (1979); Note, *Attorney Fees: Exceptions to the American Rule,* 25 DRAKE L. REV. 717 (1976).

35. 28 U.S.C. § 2412(b) (1982). *See* Note, *The Award of Attorney's Fees Under the Equal Access to Justice Act,* 11 HOFSTRA L. REV. 307, 310 (1982).

36. 28 U.S.C. § 2412(b) (1982).

37. 5 U.S.C. § 504(a)(1) (Supp. III 1985).

38. EAJA, Pub. L. No. 96-481, §§ 201-208, 94 Stat. 2325, 2325-30 (1980) (codified at 5 U.S.C. § 504 (1982) and 28 U.S.C. § 2412(d)(1)(A) (1982), *as amended by* Act of Aug. 5, 1985, Pub. L. No. 99-80, 54 U.S.L.W. 1 (1985)). H.R. REP. NO. 1418, 96th Cong., 2d Sess. 10,

EAJA is a statute designed to come to the financial rescue of parties who could not otherwise afford to challenge government actions.[39]

Any party seeking attorney's fees under the EAJA must first satisfy its preliminary jurisdiction requirements of size[40] and worth.[41] Once the jurisdiction requirements are met, the party seeking the award must prove that it "prevailed" in the litigation. Most courts have defined "prevailed" to mean "success on any significant issue in litigation."[42] However, each agency is permitted to establish its own rules under the EAJA, and therefore the extent to which awards will be made in different agency cases may vary slightly.[43] Assuming jurisdictional requirements have been met and the

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reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4988 (attorney's fees should be awarded to "those individuals for whom cost may be a deterrent to vindicating their rights").

39. *See* H.R. REP. NO. 1418, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4988. Another basis for the EAJA has been the theory that "a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy." *Id. But see* Lieberwitz, *supra* note 6, at 37 (noting that "[t]his general statement is surprising, in light of the historic use of this private attorney general theory only in connection with isolated statutes representing important public policy").

40. An unincorporated business, association, or organization must have less than 500 employees. 5 U.S.C. § 504(b)(1)(B) (Supp. III 1985).

41. The party's net worth must be less than $2,000,000 if the party is an individual, or less than $7,000,000 if the party is a business. *Id.* In the 1985 amendments, the net worth limit was raised from $1,000,000 to $2,000,000 for individuals and from $5,000,000 to $7,000,000 for organizations, partnerships associations and local units of government. *Compare id. with* 5 U.S.C. § 504(b)(1)(B) (1982). Even prior to this change, however, several commentators viewed the financial criteria as being too broad and feared that the Bill would render awards to parties it was not meant to encompass. *See Award of Attorneys' Fees Against The Federal Government: Hearings on S. 265 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 96th Cong., 2d Sess. 76-77, (1980) (statement of Mary Frances Derfner); *id.* at 86 (statement of Nan Aron) [hereinafter *Hearings on S.265*]. In addition, disputes have arisen as to the computation of net worth. *See, e.g.,* Noel Produce, Inc., 273 N.L.R.B. 769 (1984); Pacific Coast Metal Trades Dist. Council, 271 N.L.R.B. 1165 (1984); Stucco Stone Prods., Inc., 270 N.L.R.B. 1195 (1984); W.C. McQuaide, Inc., 270 N.L.R.B. 1197 (1984). *See also* Kut-Kwik Corp., 273 N.L.R.B. 838 (1984) (failure to include net worth resulted in dismissal of award request); Carpenters Local 1361, 272 N.L.R.B. 1118 (1984) (applicant must submit finances before award will be considered); United Union of Roofers, 269 N.L.R.B. 1067 (1984) (union failed to show it was a tax exempt organization and, therefore, below the net worth requirement).

42. *See* Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978). Almost every circuit has recognized this definition. *See, e.g.,* Ramos v. Koebig, 638 F.2d 838 (5th Cir. 1981); Chicano Police Officer's Ass'n v. Stover, 624 F.2d 127 (10th Cir. 1980); Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979), *aff'd,* 448 U.S. 122 (1980); Bagby v. Beal, 606 F.2d 411 (3d Cir. 1979); Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), *cert. denied,* 455 U.S. 961 (1982); Northcross v. Board of Educ., 611 F.2d 624 (6th Cir. 1979), 447 U.S. 911 (1980); Sethy v. Alameda County Water Dist., 602 F.2d 894 (9th Cir. 1979), *cert. denied,* 444 U.S. 1046 (1980); Kimbrough v. Arkansas Activities Ass'n, 574 F.2d 423 (8th Cir. 1978).

43. 5 U.S.C. § 504(c)(1) (1982). The NLRB has established that when a party in an adversary proceeding prevails only in part, only fees and expenses incurred in connection with a

party has in fact prevailed, the fees will be awarded unless the administrative agency can refute the claim by proving that its position was justified.[44]

The EAJA places the burden of proof in these proceedings on the administrative agency to demonstrate that its position was substantially justified or that "special circumstances make an award unjust."[45] The exact meaning of this burden of proof has spawned extensive litigation.[46] In order to understand the burden that the government must carry, an analysis of the meaning of both the terms, "position of the government" and "substantially justified" is required.[47] Interpretation of these terms has played an integral role in EAJA-NLRB proceedings.

A. "Position" of the Government or Agency

In the 1985 amendments to the EAJA, Congress attempted to clarify the meaning of the phrase "position of government."[48] While several courts had interpreted the "position of the government" to include only the government or agency actions during litigation and not the underlying proceeding,[49] the 1985 amendments clearly rejected this view.[50] Congress explained that

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significant and discrete portion of that proceeding are recoverable. 29 C.F.R. § 102.144(a) (1986). *See* Temp Tech Indus. v. NLRB, 756 F.2d 586 (7th Cir. 1985) (employer that prevailed on only one of three unfair labor practice charges was denied attorney's fees); Kitchen Fresh, Inc. v. NLRB, 729 F.2d 1513 (6th Cir. 1984) (employer that had been successful on appeal from an NLRB order in establishing its right to a hearing was not a "prevailing party"); Carthage Heating & Sheet Metal Co., 273 N.L.R.B. 120 (1984) (employer was not a prevailing party where dispute was settled).

44. 5 U.S.C. § 504(a)(1) (Supp. III 1985); 28 U.S.C. § 2412(d)(1)(A) (1982).

45. *Id.*

46. *See* H.R. REP. NO. 120, 99th Cong., 2d Sess. 10-11, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 138-39.

47. For interpretations of these two terms prior to the 1985 amendments, see Note, *supra* note 34; Note, *The Equal Access to Justice Act in the Federal Courts,* 84 COLUM. L. REV. 1089, 1101-11 (1984).

48. H.R. REP. NO. 120, 99th Cong., 2d Sess. 11-12, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 140-41.

49. *See, e.g.,* Alspach v. District Director of Internal Revenue, 527 F. Supp. 225, 228 (D. Md. 1981) ("position of the United States" refers to its position in prosecuting or defending litigation rather than its action upon which the suit is based). *See also* Boudin v. Thomas, 732 F.2d 1107 (2d Cir. 1984); Environmental Defense Fund, Inc. v. EPA, 716 F.2d 915 (D.C. Cir. 1983); Tyler Business Servs. v. NLRB, 695 F.2d 73 (4th Cir. 1982); Grand Boulevard Improvement Ass'n v. Chicago, 553 F. Supp. 1154 (N.D. Ill. 1982); Operating Eng'rs Local Union No. 3 v. Bohn, 541 F. Supp. 486 (D. Utah 1982), *aff'd,* 737 F.2d 860 (10th Cir. 1984).

50. H.R. REP. NO. 120, 99th Cong., 2d Sess., pt 1, at 12, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 140. "In clarifying the 'position' term, the Committee expressly rejects the holding of the District of Columbia Circuit in Spencer v. NLRB, 712 F.2d 539, 557 (D.C. Cir. 1983), *cert. denied,* 104 S. Ct. 1908 (1984), that the only government 'position' to be scrutinized in the context of an EAJA case is that taken in the litigation itself." *Id. Accord* Iowa Express Distribution Inc. v. NLRB, 739 F.2d 1305 (8th Cir. 1984), *cert. denied,* 105 S.

"[t]he Committee's clarification of the 'position' term is intended to broaden the court's or agency's focus of inquiry for EAJA purposes beyond mere litigation arguments, and to require an assessment of those government actions that formed the basis of the litigation."[51] However, Congress also modified this statement by suggesting that government or agency actions or failures to act subject to EAJA do not include preliminary or procedural decisions of the agency or government that would not be subject to judicial review.[52] The characterization of the agency action as a "procedural decision" or the "basis of litigation" is of paramount importance, for EAJA liability attaches only to a "position" of the government or agency. Assuming, however, that the action or decision qualified as the "position of the government," the agency must then prove it was substantially justified.

B. The Substantially Justified Standard

Originally, the legislative history of the EAJA defined the test of whether a government action is substantially justified as essentially "one of reasonableness."[53] The original House report stated that "[w]here the Government can show that its case had a reasonable basis both in law and fact, no award will be made."[54] To explain this standard, the House report further noted that "[t]he standard and the burden of proof adopted . . . represents an acceptable middle ground between an automatic award of fees and the restrictive standard" of requiring a showing of arbitrary and frivolous action.[55]

However, the 1985 amendments emphasized that the standard of substan-

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Ct. 595 (1984); Rawlings v. Heckler, 725 F.2d 1192 (9th Cir. 1984); Natural Resources Defense Council, Inc. v. EPA, 703 F.2d 700 (3d Cir. 1983); Lonning v. Schweiker, 568 F. Supp. 1079 (E.D. Pa. 1983); Watkins v. Harris, 566 F. Supp. 493 (E.D. Pa. 1983); Community Health Servs., Inc. v. Califano, 563 F. Supp. 1368 (W.D. Pa. 1983); Environmental Defense Fund, Inc. v. Watt, 554 F. Supp. 36 (E.D.N.Y. 1982), *aff'd on other grounds,* 722 F.2d 1081 (2d Cir. 1983); MacDonald v. Schweiker, 553 F. Supp. 536 (E.D.N.Y. 1982); Cornella v. Schweiker, 553 F. Supp. 240 (D.S.D. 1982), *rev'd on other grounds,* 728 F.2d 978 (8th Cir. 1984); Moholland v. Schweiker, 546 F. Supp. 383 (D.N.H. 1982); Citizens Coalition for Block Grant Compliance, Inc. v. Euclid, 537 F. Supp. 422 (N.D. Ohio 1982), *aff'd on other grounds,* 717 F.2d 964 (6th Cir. 1983).

51. H.R. REP. NO. 120, 99th Cong., 2d Sess., pt. 1, at 12, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 141.

52. *Id.* at 13, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 141.

53. H.R. REP. NO. 1418, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4989.

54. *Id.*

55. *Id.* at 14, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4993. The Justice Department opposed the bill and submitted its own proposal in which fees would be awarded only if the government's position was found to be "arbitrary, frivolous, unreasonable or groundless." *See* H.R. REP. NO. 1418, 96th Cong., 2d Sess. 14, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4993. *But see* Note, *Reenacting the Equal Access to Justice Act: A Proposal for Automatic Attorney's Fee Awards,* 94 Yale L.J. 1207 (1985).

tial justification is stricter than reasonableness.[56] The fact that in 1980 Congress rejected a standard of reasonably justified in favor of substantially justified indicates that the test must require more than mere reasonableness.[57] Curiously, the 1985 Committee conditioned the more restrictive standard by recognizing that the full panoply of factual and legal questions arising from various government disputes will necessitate a case-by-case basis determination of what is substantially justified.[58] In addition, statements found in the early legislative history indicate that more than one legitimate rationale may be available to the government or agency despite its failure to win a case.[59]

Although the legislative history of the EAJA demonstrates that substantially justified implies a standard more stringent than reasonable, the exact meaning of the term remains undefined. However, the 1985 amendments state that the EAJA standard conflicts with the NLRB's reasonableness standard for the issuance of a complaint. It is this conflict that may chill the General Counsel's independence to issue an unfair labor practice complaint.

III. THE EAJA AND THE NLRB: THE BIG CHILL?

Since the statute's enactment in 1980 and until 1983,[60] the NLRB was the subject of over half of the EAJA proceedings. It appears that this trend continues to date.[61] Thus, the various standards of the EAJA are important when placed in the context of NLRB proceedings. First, if the EAJA is used to attack any underlying position of the agency, the traditional independence of the General Counsel to issue complaints becomes subject to scrutiny and

56. H.R. REP. NO. 120, 99th Cong., 2d Sess., pt. 1, at 9, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 138. *See also* Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983), *cert. denied*, 446 U.S. 936 (1984); Enerhaul, Inc. v. NLRB, 710 F.2d 748 (11th Cir. 1983); Ulrich v. Schweiker, 548 F. Supp. 63, 65 (D. Idaho 1982); Nunes-Correia v. Haig, 543 F. Supp. 812, 817 (D.D.C. 1982); Wolverton v. Schweiker, 533 F. Supp. 420, 424 (D. Idaho 1982).

57. H.R. REP. NO. 120, 99th Cong., 2d Sess., pt 1, at 9, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 138.

58. *Id.* at 10, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 138.

59. "The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case." H.R. REP. NO. 1418, 96th Cong., 2d Sess. 12, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4990. Critics of the substantially justified standard insist that such a presumption does exist. "Once the prevailing party satisfies this burden of going forward, the fee *must* be awarded *unless* the government fulfills its burden of persuasion." *See* Lieberwitz, *supra* note 6, at 45.

60. *Memorandum: GC 83-11, supra* note 6, at 222 n.1.

61. At least 46 cases have been tried against the NLRB General Counsel between 1984 and 1986. *See, e.g.*, Tajon, Inc., 277 N.L.R.B. No. 184 (Jan. 13, 1986); Forest Grove Lumber Co., 277 N.L.R.B. No. 167 (Dec. 31, 1985); East Tenn. Packing Co., 277 N.L.R.B. No. 168 (Dec. 31, 1985); Bronaugh Motor Express, 277 N.L.R.B. No. 169 (Dec. 31, 1985); Adams & Westlake, Ltd., 277 N.L.R.B. No. 135 (Dec. 19, 1985).

the agency may become liable for attorney's fees. Second, the EAJA's requirement of substantial justification places a higher burden on the General Counsel to justify the issuance of a complaint than the reasonable cause standard required by the Board. Third, the review by the Board and courts may pressure the General Counsel to conform to standards she otherwise could ignore. These elements of the EAJA may "chill" the traditional freedom and independence of the General Counsel to issue a complaint, and as a result, impede the enforcement of the NLRA.

A. Position of the Agency: Is Issuance of a Complaint Subject to EAJA Proceedings?

In an NLRB proceeding, several levels of action exist. First, after a charge is filed, the Regional Director will follow the standards set forth in the LMRA and the Case Handling Manual to determine whether the charge merits the issuance of a complaint.[62] If a complaint is issued, the General Counsel takes on the role of prosecutor in the proceeding before an administrative law judge.[63] Clearly, if the General Counsel acts in an improper or arbitrary manner at the administrative hearing, a respondent would have a cause of action against the General Counsel for attorney's fees. However, it is unclear from the EAJA whether the underlying issuance of a complaint would also be subject to EAJA claims.

As mentioned above, the 1985 amendments to the EAJA clarify the term "position of government" to include government actions that formed the *basis* of the litigation.[64] In NLRB proceedings, the issuance of a complaint is the starting point for any litigation. The complaint sets forth the alleged violation of the NLRA and serves as notice of the agency proceedings against the party. Hence, it is logical to assume that, under the 1985 clarifications, the issuance of a complaint would be subject to EAJA attacks.

The 1985 legislative history, however, notes that "preliminary or procedural decisions of the agency which would not be subject to judicial review" are not actions upon which EAJA claims may be made.[65] Traditionally, the decision of the General Counsel to issue a complaint is beyond judicial review.[66] Therefore, it would appear that the issuance of a complaint, as a procedural decision, would be immune to EAJA attacks. A potential contradiction arises in the legislative history of the 1985 amendments. In prac-

62. *See supra* notes 23-31 and accompanying text.

63. *See* Morris, *supra* note 10, at 822.

64. *See supra* notes 48-52 and accompanying text.

65. H.R. REP. NO. 120, 99th Cong., 2d Sess., pt. 1, at 13, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 141.

66. *See supra* notes 15-18 and accompanying text.

tice, however, most of the EAJA cases that came before the NLRB between 1980 and 1985 challenged the initial issuance of a complaint.[67] Nevertheless, the 1985 amendments may carve out an "exception" for preliminary or procedural decisions[68] and provide a new, alternative argument to protect the General Counsel's decisions from attack.[69]

B. Substantially Justified v. Reasonableness

When the substantial justification standard is compared with the General Counsel's discretion to issue a complaint based on a finding of reasonable cause, it becomes clear that the General Counsel's standard is lower, and therefore more vulnerable, to EAJA attacks. First, the Board's current Rules and Regulations on EAJA actually contain a reasonableness standard require a showing that the General Counsel's position was substantially justified. Section 102.144(a) provides that the applicant will receive fees unless the position of the General Counsel was substantially justified. The Regulations place the burden of proof on the General Counsel to demonstrate that her position in the proceeding was "reasonable in law and fact."[70] Thus, the Board rules actually *equate* substantially justified with reasonable. However, in the 1985 amendments to the EAJA, Congress clearly indicated that mere reasonableness was not sufficient to protect the agency from an EAJA attack.[71]

Second, if the General Counsel's Regional Director has any doubt as to the merits of a charge, the complaint should be issued.[72] The "doubt" stan-

67. *See, e.g.,* Temp Tech Indus. v. NLRB, 756 F.2d 586 (7th Cir. 1985); Iowa Express Distrib. v. NLRB, 739 F.2d 1305 (8th Cir. 1984); Tajon, Inc., 277 N.L.R.B. No. 184 (Jan. 13, 1986); East Tenn. Packing Co., 277 N.L.R.B. No. 168 (Dec. 31, 1985); Rapid Rental, Inc., 277 N.L.R.B. No. 129 (Dec. 19, 1985); Phil Smidt & Son, Inc., 276 N.L.R.B. No. 122 (Sept. 30, 1985); DeBolt Transfer, Inc., 271 N.L.R.B. 300 (1984); Derickson Co., 270 N.L.R.B. 516 (1984).

68. In any event, if the General Counsel's decision to issue a complaint is to remain an independent one, it is preferable to have this decision immune from financial attack. As noted earlier, the issuance of a complaint is the starting point of litigation. A complaint states only that there is a reasonable basis for an unfair labor practice charge. By making the issuance of a complaint subject to EAJA claims, Congress has restricted the "free exchange of ideas and positions within each agency that is essential for good government." *Equal Access Reauthorization Pocket Vetoed by President,* 42 CONG. Q. WEEKLY REP. 2964 (1984).

69. President Reagan has also maintained that such a broad definition of "position" would "inhibit free discussion within an agency prior to any final agency policy decision or action for fear that any internal disagreements or reservations would be the subject of discovery and judicial inquiry." *Id.* Nevertheless, the Board and the courts have permitted EAJA attacks on the underlying basis of the issuance of a complaint and therefore the General Counsel is required to demonstrate in such cases that its position was substantially justified. *Id.*

70. 29 C.F.R. § 102.144(a) (1985).

71. *See supra* notes 53-59 and accompanying text.

72. *See supra* notes 23-29 and accompanying text.

dard is also significantly lower than substantially justified. Consequently, in "borderline" cases, the General Counsel will be less likely to issue a complaint, fearing liability because the charge did not meet the substantially justified standard. This fear could impact upon the General Counsel's traditional, unreviewable discretion to issue a complaint, and therefore "chill" government enforcement of the NLRA.[73]

C. Other Factors: EAJA Review by the Board and Courts

The General Counsel's actions under the EAJA are reviewed by the Board and the federal courts.[74] The Board, usually through an administrative law judge, decides whether attorney's fees will be awarded.[75] The review factor may influence the General Counsel to issue complaints only when she believes that the Board would also issue a complaint on the same facts.[76] Clearly, this contravenes the 1947 LMRA amendments which attempted to make the General Counsel independent from the Board on the issuance of a complaint.[77]

The General Counsel may also feel pressured by the federal courts to conform to their standards for the issuance of a complaint. For example, in *Enerhaul, Inc. v. NLRB,*[78] the United States Court of Appeals for the Eleventh Circuit held the NLRB liable for attorney's fees because the Board had

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73. *See Hearings on S. 265, supra* note 41, at 42-44 (statement of Alice Daniel, Assistant Attorney General, Civil Division, Department of Justice) (in the face of EAJA liability, the higher substantially justified standard will chill government enforcement of public interest statutes). In a letter to the Chairman of the Subcommittee, Ray Denison, Director of the Department of Legislation for the AFL-CIO maintained that:

> Such a standard would inhibit vigorous enforcement of the regulatory laws enacted by the Congress to protect the people of this country, not only by inducing a narrow and overly-cautious approach by the agency lest it risk depletion of its budget through fee awards, but by diverting agency resources and personnel into litigation of the justifiability of the Government's position in initiating any action which is ultimately unsuccessful.

Id. at 563.

74. 29 C.F.R. § 102.143(b) (1986). Review by the federal courts is discretionary. 5 U.S.C. § 504(c)(2) (Supp. III 1985); H.R. REP. NO. 1418, 96th Cong., 2d Sess. 16, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4995.

75. 29 C.F.R. § 102.148 (1986).

76. *See supra* notes 16-20 and accompanying text. The General Counsel has unreviewable discretion to issue a complaint based on a reasonable unfair labor practice charge. However, the complaint may later be dismissed after trial. Often a charge appears to have merit and yet it is only at trial, with the discrediting of witnesses, that the reasonable charges are dismissed.

77. *See supra* notes 11-13 and accompanying text.

78. 710 F.2d 748 (11th Cir. 1983). It should be noted that several of the cases discussed herein arose before the 1985 amendments clarifying the standard for substantially justified. Thus, while it is possible that the courts applied a less stringent standard than currently required, an analysis of these cases and their effect is still quite valid. The cases effectively "chill" the General Counsel's role regardless of the standard.

failed to follow the Eleventh Circuit's precedent on a point of law.[79] At issue was the interpretation of the term "protected concerted activities."[80] "Because the NLRB's position in the case was unreasonable under the law of the [Eleventh Circuit]," the court maintained that the administrative law judge and the Board "abused their discretion by dismissing Enerhaul's [EAJA] petition."[81] While the Eleventh Circuit's view not only challenges the fact that the Board and the federal courts have historically been permitted to have differences of opinion over legal issues,[82] it is extremely damaging to the General Counsel's traditional discretion to issue complaints free from judicial review.[83] The General Counsel would be compelled to issue complaints only on facts with which the courts would agree. *Enerhaul* forces the General Counsel to follow court of appeal precedent rather than Board law, and therefore undermines the authority of the Board. Finally, the General Counsel is placed in a "no-win" situation. If the Office of the General Counsel chooses to follow Board law, the circuit court will find it liable for EAJA fees. If the General Counsel chooses the circuit law, the Board will find it liable. Thus, *Enerhaul* creates confusion with respect to the application of EAJA awards and severely damages the General Counsel's traditional, unreviewable discretion.

Despite the confusion created by the *Enerhaul* decision, it is interesting to note that the Eleventh Circuit employed a reasonableness standard in that case to determine if the Board was substantially justified.[84] The *Enerhaul* court maintained that the NLRB's position was unreasonable in law.[85] The court's use of the reasonableness standard, despite its definition of substan-

79. *Id.*

80. *Id.* at 750. Both the administrative law judge and the Board upheld the General Counsel's prima facie case, even though they dismissed the complaint which alleged that the charging party employee had been discharged for his complaints about job conditions. The court of appeals held that, under Eleventh Circuit precedent, individual griping and complaining was not "protected concerted activity" and that, therefore, the General Counsel was not substantially justified in issuing a complaint. *Id.* at 751.

81. *Id.* at 751. *Cf.* Waynadotte Sav. Bank v. NLRB, 682 F.2d 119 (6th Cir. 1982) (holding that the NLRB was substantially justified, so as to deny attorney's fees, even though the NLRB's position was contrary to prior Sixth Circuit precedent).

82. When the NLRB issues a final order, it must take the order to the federal courts for enforcement. In addition, aggrieved parties may petition the courts to set aside the Board order. Therefore, Board decisions are often subject to review by the federal courts. If the court disagrees with the Board's interpretation of law or facts, it will not enforce the order. The Board is not legally required to adhere to the court's view but it will have no means by which to enforce its policy. Such "split" issues may go on for years or be taken up to the Supreme Court for a final and binding interpretation. *See* Morris, *supra* note 10, at 1697-1725.

83. *See supra* note 18 and accompanying text.

84. 710 F.2d at 750.

85. *Id.* at 751.

tially justified, is undoubtedly the main reason that both the Board and the courts have upheld most of the General Counsel's decisions to issue a complaint when an unfair labor practice is alleged. Therefore, the traditional enforcement of the NLRA has not yet been "chilled" by the EAJA.

IV. THE EAJA-NLRB EXPERIENCE 1980-1985: PRESERVATION OF THE GENERAL COUNSEL'S DISCRETION

In the five years since the EAJA was enacted, prevailing parties in unfair labor practice proceedings have frequently sued the NLRB for attorney's fees. While in most cases the Board and the courts have found that the General Counsel's decision to issue a complaint was substantially justified,[86] several cases have awarded fees.[87] Issuance of a complaint in cases involving close questions of fact or credibility determinations has been consistently upheld.[88] However, questions of law have placed the General Counsel's discretion under more extensive review and attack.[89] In addition, other issues such as whether the General Counsel must establish a prima facie case and the use of affidavits to prove substantial justification have resulted in more

86. *See, e.g.*, Temp Tech Indus. v. NLRB, 756 F.2d 586 (7th Cir. 1985); Natchez Coca-Cola Bottling Co. v. NLRB, 750 F.2d 1350 (5th Cir. 1985); Iowa Express Distrib., Inc. v. NLRB, 739 F.2d 1305 (8th Cir. 1985); Wyandotte Sav. Bank v. NLRB, 682 F.2d 119 (6th Cir. 1985); Westerman, Inc. v. NLRB, 749 F.2d 14 (6th Cir. 1984); Spencer v. NLRB, 548 F. Supp. 256 (D.D.C. 1982); Tajon, Inc., 277 N.L.R.B. No. 184 (Jan. 13, 1985); Forest Grove Lumber Co., 277 N.L.R.B. No. 167 (Dec. 31, 1985); Bronaugh Motor Express, Inc., 277 N.L.R.B. No. 169 (Dec. 31, 1985); Adams & Westlake, Ltd., 277 N.L.R.B. No. 135 (Dec. 19, 1985); Rapid Rental, Inc., 277 N.L.R.B. No. 129 (Dec. 19, 1985); Patrick & Co., 277 N.L.R.B. No. 51 (Nov. 15, 1985); Abbott House, Inc., 277 N.L.R.B. No. 24 (Oct. 31, 1985); Western Newspaper Pub. Co., 276 N.L.R.B. No. 173 (Oct. 29, 1985); Craig & Hamilton Meat Co., 276 N.L.R.B. No. 103 (Sept. 30, 1985); Phil Smidt & Son, Inc., 276 N.L.R.B. No. 122 (Sept. 30, 1985); Stonehouse Coal Co., 276 N.L.R.B. No. 140 (Sept. 30, 1985); Best Bread Co., 276 N.L.R.B. No. 145 (Sept. 30, 1985); Union Carbide Bldg. Co., 276 N.L.R.B. No. 160 (Sept. 30, 1985); B.J. Heating, 273 N.L.R.B. 329 (1984); Danzansky-Goldberg Memorial Chapels, Inc., 272 N.L.R.B. 903 (1984); V.B. Fabricators, Inc., 271 N.L.R.B. 1032 (1984); Hamel Forest Prods., 270 N.L.R.B. 1078 (1984); Bosk Paint & Sandblast Co., 270 N.L.R.B. 514 (1984); Derickson Co., 270 N.L.R.B. 516 (1984); Wright-Bernet, Inc., 270 N.L.R.B. 55 (1984); Charles H. McCauley Assoc., 269 N.L.R.B. 791 (1984); Woodview Rehab. Center, 268 N.L.R.B. 1239 (1984).

87. *See, e.g.*, Enerhaul, Inc. v. NLRB, 710 F.2d 748 (11th Cir. 1983) (reversing lower court's refusal to award fees); Evergreen Lumber, 278 N.L.R.B. No. 99 (Feb. 21, 1986) ($13,489.41); Central Motors Express, Inc., 276 N.L.R.B. No. 135 (Sept. 30, 1985) ($6,001.50); DeBolt Transfer, Inc., 271 N.L.R.B. 300 (1984) ($6,008.18); Lion Uniform, No. JD-76-83, (Atlanta Branch, NLRB, Sept. 13, 1983) ($187,469.10).

88. *See, e.g.*, Temp Tech Indus. v. NLRB, 756 F.2d 586 (7th Cir. 1985); Natchez Coca-Cola Bottling Co. v. NLRB, 750 F.2d 1350 (5th Cir. 1985); Adams & Westlake, 277 N.L.R.B. No. 135 (Dec. 19, 1985); Rapid Rental, Inc., 277 N.L.R.B. No. 129 (Dec. 19, 1985); Patrick & Co., 277 N.L.R.B. 51 (Nov. 15, 1985).

89. *See, e.g.*, Evergreen Lumber Co., 278 N.L.R.B. No. 99 (Feb. 21, 1986).

difficult questions for the Board and courts to review.[90] Generally, however, the General Counsel's decisions have been upheld.[91]

The main reason for upholding the General Counsel's decisions is the fact that the Board and courts have reviewed the General Counsel's position with a reasonableness standard rather than the higher substantial justification standard required by the EAJA. With the new 1985 amendments yet to be applied, the General Counsel's high rate of success in warding off EAJA attacks might decrease. However, since the Board has interpreted the 1985 amendments as merely clarifying substantially justified to mean "more than mere reasonableness,"[92] and has upheld several cases based on the pre-1985 standards,[93] it is unclear whether the new amendments will actually impose a more restrictive standard.

A. EAJA Attacks on Cases Involving Questions of Fact and Credibility: Upholding the General Counsel's Discretion

The Board and courts have consistently upheld the General Counsel's decisions to issue complaints where questions of fact or credibility arise as an element of the EAJA claim.[94] The standard employed by both the Board and the courts provides that as long as the General Counsel demonstrates that her position was reasonable in law and fact, it was substantially justified.[95] Accordingly, the Board and courts have upheld "close issues of fact" that can only be fully resolved at trial.

The EAJA reviewers recognize the General Counsel's right to issue complaints in cases in which the merits of the charge are questionable. For example, in *Rapid Rental, Inc.*,[96] the Board held that "the General Counsel has no obligation to restrict the issuance of complaints to sure 'winners.' "[97]

90. *See, e.g.*, Pacific Coast Metal Trades District Council, 271 N.L.R.B. No. 195 (1984) (where administrative law judge awarded fees but Board noted that he failed to consider General Counsel's reasons for not revealing affidavits).

91. In 33 cases involving the position of the General Counsel, the Board and courts held in 28 cases that the General Counsel was justified in issuing a complaint. *See supra* note 86.

92. *See, e.g.*, Adams & Westlake, 277 N.L.R.B. No. 135, at 1 n.1; Tajon, Inc., 277 N.L.R.B. No. 184, at 1 n.1; East Tenn. Packing Co., 277 N.L.R.B. No. 168, at 1 n.1; Stonehouse Coal Co., 276 N.L.R.B. No. 140, at 1 n.1; Phil Smidt & Son, 276 N.L.R.B. No. 122, at 1 n.1.

93. *See, e.g.*, Patrick & Co., 277 N.L.R.B. No. 72 (Nov. 15, 1985); Abbott House Inc., 277 N.L.R.B. No. 24 (Oct. 31, 1985); Western Newspaper Pub. Co., 276 N.L.R.B. No. 173 (Oct. 29, 1985); Best Bread Co., 276 N.L.R.B. No. 145 (Sept. 30, 1985).

94. *See infra* note 98.

95. 29 C.F.R. § 102.144 (1986).

96. 277 N.L.R.B. No. 129 (Dec. 19, 1985).

97. *Id.* at 3. *Rapid Rental* involved an alleged discriminatory discharge for union activities (§ 8(a)(3) violation), which was originally dismissed. The charging party took an administrative appeal to the Office of Appeals, which directed the issuance of a complaint.

The case went to the Office of Appeals and the respondent in *Rapid Rental* claimed that since there was a difference of opinion within the Office of the General Counsel, an inference could be drawn that there was an unreasonable basis for the complaint. The administrative law judge refused to draw such an inference, stating that "[i]f the disagreement between the [two offices] suggests anything at all, it suggests that the case in question was close enough so that different officials charged with the administration of the [NLRA] could reasonably disagree on its merits."[98]

The Board's decision in *Rapid Rental* reflects the importance of issuing a complaint when the case is "borderline." Cases such as *Rapid Rental* serve to protect the General Counsel's discretion, as well as the basic principle that it is better to issue a complaint of questionable merit than to foreclose the opportunity of subsequent litigation.

The courts have also upheld the General Counsel's decision to issue a complaint where the credibility and demeanor of a witness at trial cannot be ascertained at the time a complaint is issued.[99] Typically, the complaint establishes a prima facie case that is eventually rebutted at the administrative proceeding. Often, it is the General Counsel's witness whose demeanor is attacked, resulting in a dismissal of the complaint.[100] In *Adams and Westlake,*[101] the Board noted that the General Counsel was substantially justified in issuing the complaint because the applicant's (employer's) duty to bargain turned largely upon the facts in dispute.[102] Although the judge ultimately credited the testimony of the employer's general manager based on his demeanor, the Board held that this factor alone could not establish that the General Counsel's position was not substantially justified.[103]

Cases similar to *Adams* have demonstrated greater deference to the General Counsel's decision to issue a complaint when credibility issues involving

98. *Id. Accord* Abbott House, Inc., 277 N.L.R.B. No. 24 (Oct. 31, 1985) (holding that the General Counsel was substantially justified in issuing a complaint where the refusal-to-bargain case involved a close question of interpretation of a settlement stipulation); Western Newspaper Pub. Co., 276 N.L.R.B. No. 173 (Oct. 29, 1985) (holding that the General Counsel was substantially justified in issuing a complaint where the judge's decision turned on certain factual inferences which he was only able to draw after lengthy testimony).

99. *See* Temp Tech Indus. v. NLRB, 756 F.2d 586 (7th Cir. 1985); Adams & Westlake, 277 N.L.R.B. No. 135 (Dec. 19, 1985); Patrick & Co., 277 N.L.R.B. No. 51 (Nov. 15, 1985); Best Bread Co., 276 N.L.R.B. No. 145 (Sept. 30, 1985); V.B. Fabricators, Inc., 271 N.L.R.B. 1032 (1984); Bosk Paint & Sandblast Co., 270 N.L.R.B. 514 (1984); Wright-Bernet, Inc., 270 N.L.R.B. 55 (1984); Charles H. McCauley Assoc., 269 N.L.R.B. 791 (1984).

100. *See, e.g.,* Best Bread Co., 276 N.L.R.B. No. 145 (Sept. 30, 1985).

101. 277 N.L.R.B. No. 135 (Dec. 19, 1985).

102. At issue in this case was whether the employer had a good faith doubt, based on objective evidence, that the union lacked majority status. In order to ascertain this "good faith doubt," the credibility of the employer's general manager had to be examined. *Id.* at 1 n.1.

103. *Id.*

a witness arise. For example, in *Temp Tech v. NLRB,*[104] the Seventh Circuit Court of Appeals stated that "the EAJA was not designed to test the complaint-issuing discretion of the Regional Director . . . . [T]he fact that an ALJ might make an adverse finding on a credibility issue does not, in and of itself, deprive the General Counsel's position of a basis in fact."[105] The Fifth Circuit, concurring with the Seventh Circuit on this point in *Natchez Coca-Cola Bottling Co. v. NLRB,*[106] pointed out that it is not the duty of the General Counsel to determine the credibility of witnesses. The Fifth Circuit also suggested that placing the initial fact-finding burden of credibility on the General Counsel at the investigatory stage of the case would be a denial of due process.[107] Therefore, issues that turn on witness credibility and narrow factual disputes are virtually immune from EAJA claims. As a result, the Board and the courts are upholding the traditional practice of issuing a complaint if credibility problems arise.[108]

B. EAJA Attacks on Questions of Law: More Review and More Awards

The Board and the courts are more willing to find the General Counsel unjustified in issuing a complaint when the General Counsel misinterprets Board law. The Office of the General Counsel is afforded discretion in deciding issues of fact, but it is obligated to issue complaints based upon established Board or Supreme Court law.[109] While the EAJA permits the advancement of good faith "novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts,"[110] the General Counsel is not permitted to issue a complaint on a theory that has been expressly or impliedly rejected. In *Debolt Transfer,*[111] the administrative law judge explained that a difference exists between "the General Counsel's reasonable exploration of novel and close issues" and situations where an applicant has "wholly prevailed" in the adversary adjudication.[112] In this case, the General Counsel's position was on the "wrong side" of the line, and the Board held that the General Counsel's position was not substantially

104. 756 F.2d 586 (7th Cir. 1985).

105. *Id.* at 588, 590.

106. 750 F.2d 1350 (5th Cir. 1985).

107. *Id.* at 1351-52.

108. *See supra* notes 30-31 and accompanying text.

109. *See, e.g.,* Evergreen Lumber Co., 278 N.L.R.B. No. 99 (Feb. 21, 1986); DeBolt Transfer, 271 N.L.R.B. 300 (1984).

110. H.R. REP. NO. 1418, 96th Cong., 2d Sess. 11, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4984-85.

111. 271 N.L.R.B. 300 (1984).

112. *Id.* at 303.

justified.[113] Thus, the Board will not protect the General Counsel when she asserts legal theories that have no basis in Board law.

A more difficult problem arises when the Board has not yet adjudicated certain theories of law. For example, in *Evergreen Lumber Co.*,[114] the Board found that the applicant was entitled to attorney's fees under the EAJA because the General Counsel's basis for issuing the complaint, while novel, was not a "reasonable [or] credible extension or interpretation of existing law."[115] The administrative law judge noted that although no Board decision existed on the issue involved, the General Counsel's theory was "so untenable that it has never been raised previously."[116] The General Counsel's failure to demonstrate any basis in law resulted in an EAJA award.

In contrast to the *Evergreen Lumber* case, the administrative law judge in *Derickson Co.*,[117] held that when the General Counsel advances a theory similar to existing law, the issuance of a complaint was found to be substantially justified.[118] The reconciliation of these two cases lies in the fact that in *Derickson,* the General Counsel offered several Board cases as analogies, whereas in *Evergreen,* the novel extension was not based upon any existing Board law.[119] Therefore, while the Board and the courts will review the General Counsel's theory of law with greater scrutiny, the General Counsel still retains a great amount of discretion on questions of fact and "close" questions of law.

C. Substantially Justified Is Reasonableness in Disguise

In upholding the General Counsel on close factual questions, credibility issues, and some theories of law, the Board and the courts have equated the substantially justified standard with reasonableness. In so doing, the Board and the courts are basically holding the Office of the General Counsel responsible for the same reasonableness standard that it has traditionally followed.[120]

Pre-1985 amendment cases in which fees have been awarded do not appear to have imposed the higher substantially justified standard. For example, in *Lion Uniform,*[121] the administrative law judge determined that "the

113. *Id.*
114. 278 N.L.R.B. No. 99 (Feb. 21, 1986).
115. *Id.* at 10.
116. *Id.*
117. 270 N.L.R.B. 516 (1984).
118. *Id.*
119. *Evergreen*, 278 N.L.R.B. No. 99, at 10.
120. *See supra* note 86 and accompanying text.
121. ALJ Decision No. JD-76-83 (Atlanta Branch, NLRB, Sept. 13, 1983).

test should be one of reasonableness whether 'the government can show that its case had a reasonable basis both in law and fact.' "[122] The judge then awarded attorney's fees because "the General Counsel acted unreasonably by ignoring [the] evidence."[123] Thus, even when administrative law judges have found that the General Counsel was unjustified in her actions, a reasonableness standard was applied.

The Board has recently commented on the new 1985 amendments, asserting that Congress "did not change, but merely clarified the definition of substantially justified,"[124] and that substantially justified simply means more than mere reasonableness. But, by upholding several cases based on the pre-1985 standard, the Board has, in effect, sustained the reasonableness standard that its reviewing courts have and will continue to apply. While these phrases are interpretations of semantics, the different standards affect who will receive EAJA awards and what standard the General Counsel is held to in the issuance of a complaint. With the Board upholding the reasonableness standard that the reviewing courts have applied for the last four years, the General Counsel will not be inhibited in the issuance of a complaint.

V. CONCLUSION

The EAJA possessed the potential to chill the issuance of unfair labor practice complaints. However, interpretation by both the Board and the courts of the substantially justified standard as one of reasonableness has protected the General Counsel's traditional, unreviewable discretion to issue complaints. The question of whether the 1985 amendments may change the General Counsel's protected discretion remains unanswered. The exclusion of preliminary decisions may result in more protection if the General Counsel's initial issuance decision is placed outside the jurisdiction of the EAJA. It is more likely, however, that the more stringent requirement of substantial justification will be placed upon the General Counsel's decision. While the Board has not placed the "substantial justification" burden on the General Counsel, it is too early to determine if the federal courts will enforce the more restrictive standard. Therefore, the potential chilling effect on the General Counsel's discretion to issue an unfair labor practice complaint may still arise from EAJA proceedings.

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122. *Id.* at 8.
123. *Id.* at 10.
124. *Tajon, Inc.*, 277 N.L.R.B. No. 184, at 2 (Jan. 13, 1985).